The Evolution of China’s Legislation on Reproduction

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The Evolution of China’s Legislation on Reproduction

DU YIFANG*

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The right to control their own reproductive capacity is an important aspect of women’s ability to participate as equals in the workplace, society in general, and the political sphere. As such, women’s reproductive rights have been a part of the international struggle for the equality of women. As a result of social movements, political reform, and legal development, the right of reproductive autonomy has gradually been interpreted as a basic right of the citizens in modern Western society. As stated in the 1995 Platform developed by the Beijing conference on women’s rights:

[Re]productive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children. . . . It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.1

However, in modern China, there has been resistance to the idea that reproductive decisions belong to individual women, separate from the needs of the society in which they live.

In China, reproduction is a serious and sensitive topic. China is one of a few countries that regulate family planning in its constitution and through legislation. While some countries’ family planning regulations aim to encourage reproduction,2 China’s family planning regulations limit reproduction. Article 25 of the Constitution of the People’s Republic of China declares that “the state promotes family planning so that population growth may fit the plans for economic and social development,” and Article

49 stipulates that “both husband and wife have the duty to practice family planning.”

This article discusses how China’s policy on reproduction developed from one that encouraged population growth to the very restrictive one-child policy. Part I discusses the factors underlying the establishment of the reproduction system after 1949. Part II analyzes the transition of national policy and legislation over the period from 1980 to 2001 from encouraging to controlling childbirth. Part III discusses, in detail, the development and implementation of the one-child policy, and Part IV discusses the effects of this development. Finally, Part V explains the 2016 amendment to the Population and Family Planning Law in China, which abandoned the one-child policy.


After years of war, China had a small population at the initial stages of the People’s Republic. Considering the requirements of military and economic development, the government regarded encouraging reproduction as necessary. In this period, the population policy went through three stages: (1) one in which reproduction was encouraged; (2) one in which the embryo of population control can be seen; and (3) one in which population control policy was reversed, as described in Parts A, B and C below. Part D discusses the background of encouraging reproduction, the effects of a rejuvenated economy and a traditional culture, and the impact of a rapidly increasing population in those decades.

A. Encouraging Reproduction: 1949

In the initial stages of the People’s Republic of China, as the economy and infrastructure gradually recovered from the destruction of constant wars in previous decades, China entered a stable phase. The population was low due to decades of warfare and destruction. Considering the small size of China’s population and its need to develop, China’s government

3. XIANFA, art. 25 (1982) (China); id. art. 49.
5. See id.
encouraged couples to have more children. During that time, Chairman Mao Tse-tung regarded a fast-growing population as a positive force for economic development in China, stating, “China’s large population is a great thing. No matter how many times it would increase, we can solve it by production.” The slogan “Many hands make light work,” popularized during those decades, declared a fundamental policy that China needed and encouraged: population growth for both economic and military reasons. In addition to encouraging birth, government policy strictly limited contraception and abortion. For example, in 1950, the National Health Commission and the Military Health Commission jointly released a regulation restricting abortion for women cadres in the army and government agencies. In sum, the government forcefully encouraged reproduction.

**B. The Embryo of Population Control: The 1950s**

In 1953, the first census showed the Chinese population was 600 million. This result was far beyond the previous state estimate. At that point, the government began to recognize the problems that might be caused by rapid population growth, and a series of discussions followed. In 1954, at the first birth control forum of the State Council, Liu Shaoqi, the Chairman of the National People’s Congress Standing Committee from 1954 to 1959, stated, “The Communist Party of China agrees with birth control. It would not cause panic in China.” After this forum, the Central Government considered putting the birth control policy into a formal document. In 1955, it did so, explaining that:

Reproduction control is a major administrative issue related to people’s life. In the current historical conditions, we are in favor of the proper reproduction control for the interests of the state, family and the new generation. Local party committees should appropriately explain this policy to cadres and people (except in the

---

Finally, in 1957, at the 11th enlarged meeting of the State Council Conference, Mao Tse-tung seemed to change his previous position and indicated that:

It is necessary to promote birth control. . . . Peasants are required to control their birth rate. Citizen families with too many children are also required to execute birth control. On this issue, both urban and rural areas have same requirement. It is inappropriate to understand that we have no requirement. I propose to set up a birth control committee as one of the government organs. Nongovernmental organizations can establish a group as well. Our country’s population is increasing rapidly, and it is reasonable and possible to study methods of family planning.13

This was the first time that Chairman Mao Tse-tung referred to family planning.14 Due to his prominence, the change in Mao’s concept was influential to the development of China’s population policy. Accordingly, newspapers and other publications published many articles related to birth control and contraception. Hospitals and clinics provided the direction of contraception practice.15 In July 1957, Ma Yinchu, a famous demographer in China, published a book titled New Population Theory, in which he argued that rapid population growth interfered with industrialization development.16

In short, the idea of birth control in China originated in the latter part of the 1950s.17 This meant that the central government’s attitude towards reproduction changed dramatically in less than ten years. As the population began growing, the concept of encouraging reproduction that had prevailed in the early stage of the People’s Republic of China was erased, and birth control was proclaimed by the national leaders and official documents to be the new goal.18

14. Id. at 15. [This was the first time Mao raised the term of “Family Planning.”] Id.
15. Id. at 16–18.
16. Ma Yinchu (马寅初), Xin renkou lun (新人口论) [New Population Theory], (Guangdong Jingji Chubanshe [广东经济出版社] Guangdong Economy Press), 1998), at 11. [However, the large population will block the high speed of industrialization]. Id.
17. Kuifu et al., supra note 9, at 13, 15.
18. Id. at 15–16.
C. Reversal of Policy: The 1950s-1970s

However, the concept of birth control was not implemented because a new situation emerged in China. From 1958 to 1961, China’s population decreased sharply due to a three-year, nationwide famine. The government began to worry about the population decreasing, and most projects related to family planning were stopped.

After 1962, with the end of the famine, the population rapidly increased again. The government re-proposed the necessity of birth control, but stopped again in 1966 when the Cultural Revolution broke out. That revolution plunged China into chaos, and by November 1968, the Family Planning Committee was disbanded. Therefore, the family planning ideas from the 1950s were not executed in practice.

D. The Results of the Policies from 1949 to the 1970s

Over the period from 1949 to the later 1970s, the concept of family planning was not really implemented in China, though the idea had appeared. Encouraging reproduction was still the basic attitude of the government. However, the rate of reproduction was not only related to governmental policies, but also to economic, cultural and other social factors which affected people’s decisions about how many children to have.

The first factor affecting population during that period was the economy. In 1949, more than 80 percent of the Chinese people still lived in rural


21. Id. at 22.

22. Id. at 22.


24. Li Hua (栗华), Lvetan Yingxiang Renkou Shengyulv De Jige Shehui Yinsu (略谈影响人口生育率的几个社会因素 [Introduction About Social Factors Affecting the Population Birth Rate]) 4 RENKOU XUEKAN (人口学刊 [POPULATION JOURNAL]), 19, 19–21 (1982) (社会经济发推成影响生育的重因素...文教卫生及婚姻家庭的生育都...风俗习惯、伦理道德对生育也有很大影响). ("Social and economic development is an important factor affecting fertility... The status of culture and education and health also affects the fertility level.... Marriage and family status is also a social factor affecting fertility rate... Customs, ethics, and religion also have a great influence on fertility.").
areas and engaged in self-sufficient agricultural production. This underdeveloped and inefficient productive mode demanded a massive labor force for economic development. The planned economy system instituted after 1949 restricted peasants in rural area and agriculture was the only income for their living, which meant that the economic situation of a family depended on the family’s size and labor force participation.

The second factor was cultural. In traditional Chinese culture, people believed that “the more children, the more blessing.” Another tradition in rural areas was that only boys could be their family’s heirs. As a result, the desire to have a boy to carry on the family name lead those families with daughters to bear more children. Meanwhile, due to an undeveloped social security system, concerns about care for parents in their old age also required a high birth rate in order to care for them in future.

Finally, the third factor showed that with the progress of health services and medical technology, infant survival rate and life expectancy in China greatly improved. The National Bureau of Statistics of China indicated that neonatal mortality declined from 92.55 per thousand in the period of 1944 to 1949 to 22.90 per thousand in the period of 1980 to 1984. Meanwhile, life expectancy was dramatically extended during this period; increasing from around 35 years in 1949 to 68 years in 1980.

27. Feng Jie (冯杰), Ren Zhiying (任智英), Duoziduofu Guannian Yingxiang Xia De Zhongguo Jindai Nongye (多子多福观念影响下的中国近代农业) [The Contradiction Between Multi-Son Wealth and Modern Farm Development], 1 HEBEI XUEKAN (河北学刊) [HEBEI ACADEMIC JOURNAL] 246, 247–48 (2008). Confucianism ruled China for more than 2000 years and the multi-son wealth concept has become a Chinese societal concept for long time. Id.
28. Id.
30. Id. at 563.
As a result, the population increased quickly compared to the turbulent period before 1949, from 541 million in 1949 to 987 million in 1980.\footnote{Zhonghua Renmin Gongheguo Guojia Tongjiju (中华人民共和国国家统计局) [National Bureau of People’s Republic of China], ZHONGGUO TONGJI NIANJIAN 1983 (中国统计年鉴1983) CHINA STATISTICAL YEARBOOK 1983 (1983).}

Population growth was inevitable under the effect of the government’s encouragement, economic, cultural and other social factors.

II. THE PROMULGATION OF CHINA’S FAMILY PLANNING SYSTEMS IN LAW: LATER 1970s-2001

The Chinese population doubled in three decades, and the constantly increasing rate made the government realize the necessity of controlling population growth.\footnote{See Zhonggongzhongyang Guanyu Kongzhi Woguo Renkou Zengzhang Wenti Zhi Quanti Gongchandangyuan Gongchandangyuan De Gongkai Xin (中共中央关于控制我国人口增长问题致全体共产党员的公开信) [Open Letter from the Central Committee of the Communist Party to all the members of the Communist Party and Youth League on the control of the population growth of China] (1980), http://blog.sina.com.cn/s/blog_5036bc980102dkw.html.} As a result, over the period from the 1980s to 2001, China’s family planning system was transformed from one encouraging birth to one controlling birth. I describe this transition below on three levels: those of policy, the Constitution, and legislation.

A. Policy Level: From Encouraging Reproduction to Promoting Birth Control

In the late 1970s, when the Cultural Revolution ended, Chinese society became more stable.\footnote{Zhongguo Gongchandang Di Shiyi Jie Zhongyang Weiyuanhui Di San Ci Quanti Huili Gongbao (中国共产党第十一届中央委员会第三次全体会议公报) [Bulletin of the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China] (1978), http://cpc.people.com.cn/GB/64162/64168/64563/65371/4441902.html. 国民经济得到了进一步的恢复和发展; 全国出现了安定团结的政治局面; 我国外交政策得到了重大进展。所有这一切, 都为全党把工作重点转移到社会主义现代化建设上来准备了良好条件。[The national economy has been further restored and developed; the political situation of stability and unity has appeared in the whole country; the foreign policy of our country has been greatly developed. All this, for the whole party to focus on the work of the construction of socialist modernization to prepare a good condition.] Id.} At the time, the large number of people born in the 1950s married and had children.\footnote{See Nat’l Bureau of People’s Republic of China, supra note 29, at 563. 尤其是, 我国人口在一九六三年到一九七○年这一段时间增加得最快，现在三十岁以下的人，约占全国人口总数百分之六十五，今后每年平均将有二千多万入进入结婚生育期。[Particularly, China’s population had increased rapidly from 1963 to 1970. Currently, people under the age of thirty, account for about 65% of total population. Moving forward, there will be about twenty million people entering into the marriage period in the future.] Id.} This huge population would become a
serious social problem for the country with respect to food supply, the environment, housing, social security, and other aspects of social development. Thus, birth control again became a priority for the Central Government.

In December 1973, the family planning office of the state council introduced the national family planning policy known as “Late, Rare, Few.” This policy indicated that people should not marry until they are over 25 years of age, restrain for three years following the birth of their first child to have a second child, and limit the amount of children a couple may have to two. Local hospitals and birth control agencies were strengthened to provide the necessary birth control services, including contraceptive drugs and other implements for free.

In September 1982, the twelfth National Congress of the Communist Party of China proposed more specific goals for population control.

35. Chen Baiming (陈百明), “Zhongguo Tudi Ziyuan Shengchan Nengli Ji Renkou Chengzai Liang” Xiangmu Yanyu Fangfa Gailun (“中国土地资源生产能力及人口承载量”项目研究方法概论) [An Outline of The Research Method of the Project “the Productivity and Population Carrying Capacity of the Land Resource in China”], 3 ZiYUAN XUEBAO (自然资源学报) [JOURNAL OF NATURAL RESOURCES] 198, 197–205 (1991). China is bearing the greatest number of people in the history with the most serious resources in history. In arable land, for example, from 1985 to 1987 the cumulative net reduction of 31 million–600 thousand acres of arable land, an average of about 10 million–500 thousand acres per year, and from 1988 onwards to 2000, even by 7 million acres, the arable land will be reduced by 91 million acres. Reverse development of cultivated land and population in the years per capita consumption decreased. It would be much shorter in future.


37. Dang He Guojia Lingdaoren Guanyu Renkou Yu Jihua Shengyu De Lunshu (党和国家领导人关于人口与计划生育的论述) (Speech of Party and State Leaders on Population and Family Planning), Zhongguo Renkou Chubanshe (中国人口出版社) [China Population Press] 10 (1997). 毛泽东主席提出关于避孕工作，要送上门去，避孕药物，器械这些东西，免费提供，挨家挨户，因为人家不好意思来领。[Mao Tsetung emphasized the work of contraception. He said contraceptive drugs and instruments should be provided for free and sent to people’s homes because people feel too shy to get it.]

38. Hu Yaobang (胡耀邦), Hu Yaobang Zai Zhongguo Gongchandang Di Shier Ci Quanguo Daibiao Dahui Shang De Baoguo (胡耀邦在中国共产党第十二次全国代表大会上的报告) [Hu Yaobang’s report on the Twelfth National Congress of the Communist Party]
aimed to control China’s population so that it would be less than 1.2 billion by the end of the 20th century.\textsuperscript{39} This meant that the target population would be 0.4 billion less than the expected population growth following the then-current trend. The Twelfth National Congress determined “to implement family planning as one of basic national principle.”\textsuperscript{40}

Although the government at that time regarded birth control as a national policy, it was unstable and non-mandatory. Birth control policies were implemented by education, persuasion, and propaganda, which had caused the birth control system to be inconsistent before 1980.\textsuperscript{41} Because there was no regulation at the legislative level, some regions did not execute birth control proposals or policies, while other regions appeared to force tubal ligation, abortion, and even infanticide.\textsuperscript{42} Under these circumstances, normative laws and regulations were urgently needed.

\textbf{B. Constitutional Level: Programmatic Regulations on Family Planning}

The year 1982 was an important milestone for the construction of the Chinese legal system. After the termination of the Cultural Revolution, the government gradually recognized the importance of the legal system and many laws were enacted, such as the Organization Law of the People’s Republic of China concerning the National People’s Congress, the Organization Law of the State Council of the People’s Republic of China, and, most importantly, the Constitution of the People’s Republic of China.\textsuperscript{43}

Against this legal and social background, birth control was written into the Constitution as one of the constitutional obligations.\textsuperscript{44} Article 25 of the Constitution (1982) provides, “The state promotes family planning so that population growth may fit the plans for economic and social development.”\textsuperscript{45} Also, Article 49 states, “Both husband and wife have the obligation to practice family planning.”\textsuperscript{46} Although there was no specific

\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Martin King Whyte et al., Challenging China’s One-Child Policy, 74 CHINA J. 144, 145–50 (2015).
\textsuperscript{42} Id. at 150.
\textsuperscript{44} XIANFA art. 25 (1982) (China).
\textsuperscript{45} Id.
\textsuperscript{46} Id. art. 49.
legislation issued for family planning, it was included in the Constitution for the first time. Thus, family planning was regarded as a basic national policy by the Constitution, but, unfortunately, reproduction was defined as an obligation at the constitutional level.

C. Legislation Level: The One Child System

Although the Constitution defined the principle of family planning, there was no family planning regulation on the legislative level. By the 1990s, China began to open up and play an international role. With the reforms and opening-up policy of Deng Xiaoping, China’s economy started to develop rapidly. China increased efforts to attract international investment, on the one hand, and to encourage the development of domestic enterprises on the other hand. All this development demanded a more rational legal system and more elaborate legislation, which required the
Chinese government to pay more attention to constructing its legal system.51 China entered into an active legislation stage. In this period, two laws were promulgated relating to family planning. In 1992, the Protection of Rights and Interests of Women Law was enacted, which stated that women have the right to have children as well as the freedom not to have any children.52 This was a great improvement because it was the first time in China that reproduction was defined as a right instead of as an obligation. Although this right has many limitations, because the article referred to provided that the right should be exercised in accordance with relevant regulations, in fact no other regulations defined family planning on the national level at that time.53

In 2001, the Population and Family Planning Law, meant to be the new basic law in reproduction, was enacted.54 Article 18 of this law provides: “The State maintains its current policy for reproduction, encouraging late marriage and childbearing and advocating one child for one couple. Where the requirements specified by laws and regulations are met, plans for a second child, if requested, may be made.”55

These two paragraphs provide a summary of Chinese family planning legislation on the national level up until 2015.56 China had established a clear constitutional foundation and legislation for family planning in this period. However, because of the complexity of population issues, the practice of the family planning system was left to the different provinces, and areas of China proceeded according to similar but different measures and regulations, as described in the next section.

51. Yifa Zhiguo Jiben Fangye De Tichu He Fazhan (依法治国基本方略的提出和发展) [The Basic Strategy of Rule of Law Propose and Develop] ZHONGGUO RENDA WANG (中国人民网) [CHINA NATIONAL PEOPLE’S CONGRESS] (Nov. 18, 2014, 10:46 AM) http://npc.people.com.cn/n/2014/1118/c14576-26046559-4.html. In 1997, the 15th meeting of National Congress of the Communist Party set the “rule of law” as the basic strategy of governing the country. It further established “a socialist country ruled by law” as the major task of socialist modernization and put forward the construction of China socialist legal system as an important goal. In 1999, “rule of law” was written in the Constitution of China. Id.


53. See id.


55. Id.

56. Id.

57. Id.

The Chinese Constitution does not explain the content of family planning. According to Article 18 of the Population and Family Planning Law (2001), described above, family planning policy was generally recognized as being that one couple can have only one child. However, in practice, because of China’s vast territory and ethnic diversity, the implementation of birth control policy was located on the provincial level to accommodate different conditions. Consequently, each provincial government had its own family planning regulations, which vary widely among each province. Accordingly, the one-child policy was accomplished by different regulations in different areas.

With respect to practice under Article 18 of the Population and Family Planning Law, it could be clarified from following aspects: What did one child mean? Who could have a second child? How was the policy implemented, and what happens if a couple violates the policies? Each of these questions is discussed in subparts A through D below.

A. What Does One Child Mean?

According to Article 18 of the Population and Family Planning Law (2001), it was generally recognized that one couple could only have one child. How was this policy implemented in the different provinces? China has 33 provincial level administrative regions, including four municipalities, 22 provinces, five ethnic minority autonomous regions, and two special administrative regions. As shown in Table 2, twenty-eight provinces adopted the one-child policy as the basic family planning system; two provinces regarded two children as the basic family planning system; and three provinces set no limitation on family size.

58. Id.
59. Id. arts. 18, 25.
### Table 1

**AN OVERVIEW OF ONE-CHILD AND TWO-CHILD STATUS IN CHINA TO THE END OF 2015**

<table>
<thead>
<tr>
<th>Number of Children</th>
<th>Provinces</th>
<th>No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>One child allowed</td>
<td>Anhui, Beijing, Chongqing, Fujian, Gansu, Guangdong, Guangxi, Guizhou, Hainan, Hebei, Henan, Heilongjiang, Hubei, Hunan, Jilin, Jiangsu, Jiangxi, Liaoning, Ningxia, Qinghai, Shandong, Shanxi, Shaanxi, Shanghai, Sichuan, Tianjin, Yunnan, Zhejiang</td>
<td>28</td>
</tr>
<tr>
<td>Two children allowed</td>
<td>Inner Mongolia, Sinkiang</td>
<td>2</td>
</tr>
<tr>
<td>No limit</td>
<td>Tibet, Hong Kong, Macao</td>
<td>361</td>
</tr>
</tbody>
</table>

---


[Heilongjiang Sheng Renkou Yu Jihua Shengyu Tiaoli (黑龙江省人口与计划生育条例)] [Heilongjiang Sheng Renkou Yu Jihua Shengyu Tiaoli (黑龙江省人口与计划生育条例)] [Heilongjiang Sheng Renkou Yu Jihua Shengyu Tiaoli (黑龙江省人口与计划生育条例)] [Heilongjiang Sheng Renkou Yu Jihua Shengyu Tiaoli (黑龙江省人口与计划生育条例)] [Heilongjiang Sheng Renkou Yu Jihua Shengyu Tiaoli (黑龙江省人口与计划生育条例)] [Heilongjiang Sheng Renkou Yu Jihua Shengyu Tiaoli (黑龙江省人口与计划生育条例)]


Thus, most of the provinces implemented the strict one-child policy, and only a few provinces implemented a two-child policy or no limitation. Nevertheless, those provinces that regarded the one-child policy as the principal family planning regulation considered a variety of factors in implementing the system, such that, when couples satisfied certain conditions, they could apply to have a second or even more children. 62

B. When Can a Couple Have a Second Child?

Although a second child is an exception under the one-child policy, every province established various detailed regulations to qualify to have a second child. 63 If couples were qualified according to the relevant regulations, they might have the right to have a second child. The qualifications to have more than one child varied, but can be subdivided into three types. The first was based on the couple’s situation, the second was based on the family’s situation, and the third was based on the children’s situation.

### TABLE 2

**Factors for Second Child Permission in Different Provinces** 64

<table>
<thead>
<tr>
<th>Family Classification</th>
<th>Regulation Detail</th>
</tr>
</thead>
<tbody>
<tr>
<td>Couple’s situation</td>
<td></td>
</tr>
<tr>
<td>One Child</td>
<td>Both are only children.</td>
</tr>
<tr>
<td></td>
<td>One parent is the only child in rural area.</td>
</tr>
<tr>
<td></td>
<td>One parent is the only child of a martyr.</td>
</tr>
<tr>
<td>Ethnic minority</td>
<td>Both are ethnic minorities.</td>
</tr>
<tr>
<td></td>
<td>Both or one is an ethnic minority in rural area.</td>
</tr>
<tr>
<td>Handicapped or martyr</td>
<td>Both or one side is martyr.</td>
</tr>
<tr>
<td></td>
<td>Both or one is handicapped because of industrial injury.</td>
</tr>
</tbody>
</table>

62. See supra note 61 and accompanying text.
63. Id.
64. Id.
Both or one is handicapped in rural area.

Overseas relationship
- Overseas Chinese.
- Returned overseas Chinese.
- Hong Kong, Macao or Taiwan citizens but living in mainland provinces.

Type of work
- Underground mineworker.
- Ocean deep water operations
- Ocean fishing and only child is a girl.
- Coastal fishermen engaged in maritime operations.

Residential zone
- Live in mountain areas, and only child is a girl.
- Settle in village allocated on the border of the country.
- Settle in the reclamation area along the coast.
- Island residents.

Family’s situation
- In rural area and more than two generations had only one child.
- In rural area and wife is the only child in family and husband settled in her family.
- In rural area; husband’s brothers have no child and are infertile.

Child’s situation
- The first child is handicapped and cannot participate in normal labor force.
- In rural area and first child is a girl.

These complicated second child regulations meant that China’s family planning system varied in practice, due to complicated political, cultural, and economic factors, as well as urban-rural policy, ethnic policy, social security policy, or even foreign policy. For example, the difference between application of the policy in urban and rural areas was because the social security system in China did not adequately cover rural areas. Thus,
policies that allowed couples to have a second child if the first child was a girl or the husband settled in with the wife’s family in a rural area, took into account both the absence of social security in rural areas and deeply ingrained traditional concepts. For another example, policies concerning martyrs, underground miners, and workers involved in deep-water ocean operations involved compensation for difficult work and also encouraged people to work in these areas in order to avoid decline of the industries. In addition, the family planning policy concerning ethnic minorities took their population status and their traditional customs into account. Finally, policies such as giving permission to have a second child in families with only one child living in mountainous areas were intended to maintain basic population living in these areas, and those allowing the birth of a second child in areas along the borders were based on military security.

Because so many factors were considered, the family planning system became quite diversified. In other words, although the one-child policy was the basic principle of China’s reproduction system, it did not mean that all Chinese couples could only have one child.

C. Management

Different local governments adopted various administrative regulations to manage reproduction. There were three administrative management modes used by different local governments: a license system, a registration system, and a registration and management system. Urban and rural areas apply according to different systems. As article 10 in China Social Insurance Law “Workers shall participate in basic pension insurance and the basic pension insurance premiums shall be paid jointly by the employing entities and the workers”. In article 20, the State establishes and improves the new rural social pension insurance system. The new rural social pension insurance involves a combination of personal payment, collective subsidy and government subsidy.


67. See Jia Yumei (贾玉梅), *Bianjing Diqu Renkou Anquan Yu Jingji Shehui Fazhan Yanjiu (边境地区人口安全与经济 社会发展研究)* [A Study of Population Security and Economical Social Development in Border Areas], 5 RENKOU XUEKAN (人口学刊) [POPULATION JOURNAL] 22, 22–29 (2012). "Population security is the foundation and important guarantee of national security. Countries should increase efforts to support the border areas, improve population policy, maintaining the security of the population in the border areas." Id.

system, and a postpartum certification system. The number of provinces employing each one is shown in Table 4.

**Table 3**

**MANAGEMENT SYSTEMS FOR THE FAMILY PLANNING SYSTEM TO THE END OF 2015**

<table>
<thead>
<tr>
<th>Implementation</th>
<th>Provinces</th>
<th>No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>License system</td>
<td>Jiangxi</td>
<td>1</td>
</tr>
<tr>
<td>Registration system</td>
<td>Anhui, Fujian, Gansu, Guangxi, Guizhou, Hainan, Hebei, Henan, Shanxi,</td>
<td>21</td>
</tr>
<tr>
<td></td>
<td>Hubei, Hunan, Jilin, Liaoning, Ningxia, Shandong, Shaanxi, Sichuan,</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Tianjin, Tibet, Yunnan, Inner Mongolia</td>
<td></td>
</tr>
<tr>
<td>Postpartum certificate</td>
<td>Zhejiang</td>
<td>1</td>
</tr>
<tr>
<td>system</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not specified</td>
<td>Beijing, Chongqing, Guangdong, Heilongjiang, Jiangsu, Qinghai, Shanghai,</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>Sinkiang</td>
<td></td>
</tr>
</tbody>
</table>

Initially, most provinces adopted the license system to manage the one-child policy but it was gradually abolished by most provinces at the end of 2015, leaving only Jiangxi province. Under this system, couples could have a child only after strict review and no reproduction was allowed without approval. In accordance with Article 8 of the Jiangxi Family Planning Regulations, couples could have a child only after strict review and no reproduction was allowed without approval. In 2009, this article was amended to “implement first child birth license system and second child birth license system.” In 2016, it was modified to “implement birth registration system and second child birth approval system.”

69. *Id.*
70. *Id.*
71. See Jiangxi Sheng Renkou Yu Jihua Shengyu Tiaoli 2009 (江西省人口与计划生育条例 2009) [Jiangxi Province Population and Family Planning Regulations] (promulgated by the Jiangxi Province People’s Cong. Standing Comm., June 16, 1990; third revision by the Jiangxi Province People’s Cong. Standing Comm., June 16, 1990; fourth revision by the Jiangxi Province People’s Cong. Standing Comm., Oct. 23, 2002), Article 8 states: "生育第一胎的，在分娩前，凭结婚证、户口簿，以及夫妻双方或者单位（村）领导的证明，经一方户籍所在地的乡（镇）人民政府或者街道办事处审批发给《一胎生育证》” [Article 8 defines the first fertility before child birth. The definition is based on the marriage certificate, residence booklet, and couples’ employer or suburb (urban) committee’s certificate. Upon review, the local government would issue “first birth certificate” after approval]. *Id.* In 2009, this article was amended to “implement first child birth license system and second child birth license system.” In 2016, it was modified to “implement birth registration system and second child birth approval system.”
Planning Regulation, for example, couples needed to provide a marriage certificate, household register, and proof from their employer or village (residential) committee to the government agency where the husband’s or wife’s household was located for inspection in order to get a reproduction license to have a child. All these proofs from their employer or village committee were used to prove they had never given birth before. The registration system, by contrast, required couples to register at their local governmental agency after pregnancy, but before childbirth. The registration involved submitting information such as their marriage situation, first childbirth situation, household registration, and other family information.

rev’d by the Jiangxi Province People’s Cong. Standing Comm., Mar. 27, 2009, (Article 77 defines the following situation as listed in unplanned birth... (2) Fulfill the condition defined in the article 9 clause, but have not applied Second Birth License.) Id.

73. See Jiangxi Sheng Renkou Yu Jihua Shengyu Tiaoli 2002 (江西省人口与计划生育条例2002) [Jiangxi Province Population and Family Planning Regulations] (promulgated by the Jiangxi Province People’s Cong. Standing Comm., June 16, 1990; third revision by the Jiangxi Province People’s Cong. Standing Comm., Oct. 23, 2002) (Article 8 defines the following situation as listed in unplanned birth... (2) Fulfill the condition defined in the article 9 clause, but have not applied Second Birth License.) Id.


76. See Anhui Sheng Renkou Yu Jihua Shengyu Tiaoli (安徽省人口与计划生育条例) (1) 填写完整的《生殖保健服务证登记表》; (2) 夫妻的近期户口簿, 居民身份证, 结婚证; (3) 夫妻双方近期生育服务证2张; (4) 乡镇以上计划生育技术服务单位或卫生部门出具的女方孕情检查证明 [Take Anhui province as an example.]
The registration system enabled the government to provide childbirth services and to manage the couple’s reproduction status. The registration system was both more reasonable and more efficient than the license system.

In the postpartum certificate system, local governments would issue a first child birth certificate to women after they gave birth. This system allowed automatic registration through hospitals and clinics after childbirth instead of requiring couples to register at the government agency by themselves. Compared to the other two systems, the postpartum birth certificate system was better at respecting personal privacy rights and reproductive rights. Unfortunately, this postpartum birth certificate system was not common in China—only Zhejiang province adopted this mode.

D. Sanctions for Violation of the Policy

Since the one-child policy was stipulated in law as the basic principle, when couples violated the policies implemented by the systems described above, what sanctions would be imposed on them? Article 19 of the Population and Family Planning Law provided that family planning implementation should mainly rely on contraception. Article 41 indicated that couples should pay social maintenance fees for any violation to compensate the state for the costs of an additional child. This method restricts the behavior of multi-fertility, and makes those couples compensate for society. These regulations indicated that the execution of the family planning system

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79. Id. art. 19.

80. Id. art. 41.

mainly depended on prevention before childbirth and payment of a social
maintenance fee after childbirth. However, there was no description in
the law about how to make prevention effective or how to select the method.
In practice, as shown in Table 4, different provincial governments followed
several different methods: pregnancy termination, taking remedial measures,
and charging the social maintenance fee.

**TABLE 4**

**ENFORCEMENT MEASURES FOR COUPLES WHO VIOLATE FAMILY
PLANNING REGULATION IN DIFFERENT PROVINCES**

<table>
<thead>
<tr>
<th>Enforcement Measure</th>
<th>Provinces</th>
<th>No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Termination of pregnancy</td>
<td>Anhui, Fujian, Guizhou, Hainan, Hebei, Henan, Shanxi, Heilongjiang, Hubei, Hunan, Jilin, Jiangsu, Jiangxi, Liaoning, Ningxia, Shaanxi, Zhejiang</td>
<td>17</td>
</tr>
<tr>
<td>Remedial measures</td>
<td>Fujian, Gansu, Guangdong, Guizhong, Henan, Jiangxi, Qinghai, Shanxi, Shaanxi, Sichuan, Tianjing, Tibet, Sinkiang, Chongqing</td>
<td>14</td>
</tr>
<tr>
<td>Collection of social maintenance fee</td>
<td>Guizhou, Zhejiang</td>
<td>2</td>
</tr>
<tr>
<td>Not specified</td>
<td>Beijing, Guangxi, Inner Mongol, Shandong, Shanghai</td>
<td>5</td>
</tr>
</tbody>
</table>

As Table 4 shows, 17 provinces, or more than half of all the provinces,
adopted pregnancy termination to address violations of family planning
regulations. Some provinces, such as Fujian, Henan and Shanxi, adopted
multiple methods, which adopted both pregnancy termination and remedial
measures. Guizhou adopted all three enforcement measures to impose
sanctions for violation of the birth control regulations.

82.  See id.
84.  Id.
In sum, during this period, legislation defined reproduction as a right, but with many limitations. Meanwhile, although China implemented a very strict family planning system that set the one-child policy as the principle, it also had many exceptions to the policy that allowed a couple to have more children. Based on different provinces’ regulations, the one-child policy varied in its definition and implementation, and provinces also had different regulations on sanctions as well.

**IV. The Effects of Implementation of the Family Planning System: 2001-2015**

The basic legislation of China’s reproduction policy, the Population and Family Planning Law, evoked controversy after it was implemented in 2001. Opponents criticized the strict reproductive regulations as conflicting with the right of reproduction contained in the Constitution. This article does not judge the propriety of the Population and Family Planning Law, but seeks simply to analyze its implementation and prospects. Section A below assesses the effects of the family planning system on China’s population. Section B describes local regulatory reforms that took place in the absence of reform legislation. Section C discusses the different attitudes to the population policy and law that developed in the academy, government, and Communist Party of China and led to its amendment.

**A. The Effect of the Family Planning System on Population Size**

The rate of growth of China’s population has decreased since family planning regulation was implemented in recent decades. The policy of encouraging reproduction had led to a high fertility rate in 1960s in China.

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85. Li Tiezhu (李铁柱), *15 Xuezhe Shangshu Quanguo Renda Jianyi Xiugai Renkou Yu Jihua Shengyu Fa* (15 Scholars’ Proposal to National People Congress to Amend Population and Family Planning Law), [http://news.jcrb.com/xsw/201207/z20120706_898548.html](http://news.jcrb.com/xsw/201207/z20120706_898548.html) (explains how the Current Population and Family Planning Law places emphasis on controlling the population and establishing a fertility approval system. It also forces over-birth families to pay social compensation fees and sanctions economic or duty punishment upon those parents. This is viewed as improper restrictions on the reproductive rights of citizens, but also does not conform to the provisions on the protection of human rights in China’s Constitution).

86. In 1982, the birth rate was 2.22%. In 1990, the rate was 2.11%. In 2000, the rate was 1.4%. In 2014, the rate was 1.24%. See Nat’l Bureau of Stats. of China [NBS], *Basic Statistics on Population*, [http://data.stats.gov.cn/tablequery.htm?code=AD03](http://data.stats.gov.cn/tablequery.htm?code=AD03) (showing birth rates in China).

87. In the 1960s, the fertility rate was around 3.5%. In 1963, it reached the highest rate of 4.36% during that period. See Nat’l Bureau of Stats. of China [NBS], *Basic Statistics on Population*, [http://data.stats.gov.cn/search.htm?s=1963%e4%ba%ba%e5](http://data.stats.gov.cn/search.htm?s=1963%e4%ba%ba%e5)
Statistics showed that the fertility rate of Chinese women in 1969 was 3.4%.\textsuperscript{88} However, from the 1970s to 1990s, as the family planning policy was implemented, the fertility rate slumped to lower than 1.5% in 2000.\textsuperscript{89} With the promulgation of the Population and Family Planning Law in 2001 and other local regulations, the fertility rate entered a relatively stable phase and slightly decreased from 1.4% to 1.2% after 2000.\textsuperscript{90}

On the other hand, drawbacks of the system of birth limitation regulations gradually began appearing in the 1990s. The first problem is an aging population. As shown in Table 5, the elderly population in China had been increasing rapidly. Following this trend, China’s aging population would rise from 5.5% of the total population in 1990 to 11.5% in 2020, and the number of elderly people would exceed 240 million at that time.\textsuperscript{91} Because of the lack of a young population to provide resources to care for the elderly population, China has been required to increase pension expenses borne by the state, thus increasing the burden to the whole society.

\textsuperscript{88} See NAT’L BUREAU OF STATS. OF CHINA [NBS], Basic Statistics on Population, http://data.stats.gov.cn/search.htm?s=1969%20%E4%BA%BA%E5%8F%A3%E5%87%BA%E7%94%9F%E7%8E%87.http://data.stats.gov.cn/search.htm?s=1969%20%E4%BA%BA%E5%8F%A3%E5%87%BA%E7%94%9F%E7%8E%87 (showing the fertility rate for 1969).


\textsuperscript{91} Tan Lin (谭琳), Zhongguo Renkou Laolinghua Fazhan Qushi Yuce Yanjiu Baogao (中国人口老龄化发展趋势预测研究报告) [A Forecast of the Development Trend of China’s Aging Population], 2 ZHONGGUO FU YUN (中国妇运) [CHINESE WOMEN’S MOVEMENT] 15, 15–18 (2007).
Another problem related to population size was the threat of a labor force shortage. The population in the labor force had been continually declining. The National Bureau of Statistics declared in 2014 that the labor force population was nearly 1 billion, reduced by 3.7 million from the end of 2013. This decline would affect China’s developing economy. A labor force shortage would raise the cost of enterprises and lead to a further decline in investment. After 2012, the labor force in China appeared to reach the Lewis turning point, that is, there was no more surplus rural labor. Thus, the labor transfer from agriculture to non-agricultural industries had slowed down and has reduced the efficiency of resource allocation.

All these changes indicated that the traditional components that supported the rapid increase in the Chinese economy had disappeared or declined.

There is no doubt, therefore, that one cause for these problems occurring was due to the family planning system being first introduced in the 1980s by the Chinese government. However, the process of urbanization was

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<tbody>
<tr>
<td>Population (millions)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1982</td>
<td>49.91</td>
<td>63.68</td>
<td>88.21</td>
<td>137.55</td>
<td>144.34</td>
</tr>
<tr>
<td>Total percentage of population</td>
<td>4.9</td>
<td>5.5</td>
<td>7.0</td>
<td>10.1</td>
<td>10.5</td>
</tr>
</tbody>
</table>


94. Guo Han & Ren Baoping, Demographic Divided Changes and Economic Development in China, 3 Contemporary Fin. & Econ. 5–13 (2014).


an independent cause of the decline. More and more people were seeking to stay in cities rather than in the countryside because cities could provide better living conditions and more job opportunities. Nevertheless, this internal migration flow had increased the burden on citizens, such as the cost of children’s education, the price of apartments, and a strain on medical resources. Under these circumstances, many couples made the decision to either have only one child or no children for personal reasons unrelated to the one-child policy.

B. Reform by Local Governments

These new population problems became an important focus again, especially for local governments who had the power to alter the implementation of the policy. Although the Central Government had no adjustment mechanism for family planning, on the local government level many provincial governments began to adjust the local regulation of family planning policy. For example, in 2014, Zhejiang province amended the population and family planning regulations of Zhejiang province, changing Article 19.1 as follows: “for those couples which have already had a child, if both of them or one of them is an only child, they are qualified to have a second child.” This was the first province on the mainland not an ethnic minority area to relax the one-child limitation. By the end of 2014, more than 50% of the provinces had also done so. Revision of these articles indicated

97. See id.
98. Id.
104. Id.

27
a new policy that couples qualified to have a second child not only if both of them were the only child in their family but also if only one of them was an only child. Thus, the local governments adopted looser regulations than the Central Government.

After this change, in 2014, more than one million couples in China applied for permission to have a second child. The birth rate increased to 12.37 per thousand; 0.29 per thousand higher than the birth rate of 2013. The National Bureau of Statistics reported that there were 16.87 million infants born in 2014, and 9.77 million individuals died. This ratio of births to deaths was close to the data from 2013. In short, thanks to relaxation of the one-child policy, the declining trend in the birth rate of previous years was reversed.

Although local governments had been trying to modify the local policy or regulations to relieve the population problem, there was still no change in legislation at the national level at that time. More discussion was needed to review the relevant family planning policy regulations in order to solve these problems.

C. Changing Attitudes to the Population Policy and Pressures to Amend the Law

As time went on, a number of influential people began to challenge the validity of the one-child policy. In 2014, six deputies of the National People’s Congress signed a joint proposal to cancel the social maintenance fee. They believed that reproduction was one of the basic rights recognized by the Constitution, and that charging a social maintenance fee violated this right. In 2015, fifty famous law professors and scholars in China strongly proposed modification of the current Population and Family Planning Law. They suggested abandoning the existing reproduction registration

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108. Id.
111. Id.
112. Some 50 legal scholars jointly recommended the abolition of reproduction approval. Li Buyun Deng 50 Ge Falv Xuezhe Gongtong Jianyi Zixing Quxiao Shehui Fuyangfu Zhidu (李步云等50个法律学者共同建议取消社会抚养费制度) FAXUE
system and the social maintenance fee system. They emphasized, as the Constitution, Population and Family Planning Law, and Law on the Protection of Rights and Interests of Women also acknowledge, that reproduction is one of the basic rights of citizens. Thus, these proposals demanded the protection of a basic civil right.

Meanwhile, the attitude of national party leaders also changed. Li Keqiang, the Premier of the State Council, referred to the reform of family planning services and their management in the 2015 Report on the Work of the Government, indicating that the function of the government in relation to reproduction would be changed from constraining the size of the population to providing reproductive services. The report did not add the phrase “to adhere to the basic state policy of family planning.” As a signpost of national and government work, the modification of these terms in the government work report indicated the possibility of amendment in the family planning system by the government.

Finally, on October 29, 2015, the 18th Communist Party of China’s 5th Plenary Session of the Central Committee decided “to adhere to the basic state policy of family planning; to improve the population development strategy; to fully implement the policy that a couple can have two children; and actively carry out policies to deal with aging population.” The promulgation of this decision demonstrated the attitude of the Communist Party of China, one in favor of change to a two-child policy. The declaration


113. Id.
114. Id.
115. Id.
of policy conformed to the trend of development, but was contrary to the existing legal system, requiring legislative amendment.

V. THE POPULATION AND FAMILY PLANNING LAW AMENDMENT (2016)

On December 27, 2015, the 18th meeting of the 12th session of the Standing Committee of the China National People’s Congress finally passed a revision of the Population and Family Planning Law, to be implemented January 1, 2016. The amendment focused on Article 18 of the Population and Family Planning Law (2001). It clearly prescribed nationwide implementation of a two-child policy, advocating that each couple have two children. Thus, the one-child policy that lasted more than 30 years in China became history, and China officially entered the stage of two children.

In addition, clauses 2, 3, and 4 of Article 18 of the new population and family planning law also provide that, in line with conditions defined in law and regulation, a family could arrange to have even more than two children. The specific measures would be prescribed by provinces, ethnic minority autonomous regions, and municipalities. If a couple came from and were registered in different provinces, ethnic minority autonomous regions, or municipalities, and those provinces, autonomous regions, or municipalities had differing regulations about reproduction, those couples may select the policy which is most beneficial to them. This means that, within a basic two-child policy, local governments have the right to prescribe when couples can have even more children.

In Shanghai, for example, on February 23, 2016, the Shanghai People’s Congress revised Article 23 of the Shanghai Population and Family Planning Regulation. The amendment states that each couple may have more than two children if they meet one of the following conditions:

A. One party of the couple had no child before marriage; the other had one child before marriage; and they had another child together after their marriage.

B. Both parties had two or more children before marriage, but had not given birth to another child after marriage.


119. Id.

120. Id.

121. Id.

122. Id.
C. Neither party of the couple have had a child before their marriage, and they bore two children after marriage, but the first child is identified as disabled due to non-hereditary reasons by medical identification agencies at the municipal, district, or county level, and there is little possibility that the child will grow up into an individual with normal working ability.  

Around this time, Guangdong, Zhejiang, Beijing, and most other provinces revised their local population and family planning regulations based on the amendment of the Population Family Planning Law. Under the new policies, each couple could have two children, and there were procedures to qualify for more than two children; the legal sanctions for violation of the new policy would be defined in provincial regulation. Thus, the family planning system still can only be understood in light of different provinces’ policies.

China’s population planning system still has a series of legal implementation problems that need to be resolved, however. These include adjusting family planning policies not only to conform to the Population and Family Planning Law, but also to address related problems, such as social maintenance charge collection, floating population management, family planning incentives, social security of families who have lost their only child, and family planning service improvement. Only by improving the administrative regulations and local laws and regulations can the new amendments of the Population and Family Planning Law be properly and fully implemented.

Although the amendment of the Population and Family Planning Law has loosened the family planning system, this amendment has not changed its obligatory nature. The current legislation sets lower limitations on the number of children, compared to the legislation in 2001, but it still does...
not give women full freedom of reproductive choice. More important, family planning is still officially regarded as a constitutional obligation for Chinese citizens, not a basic human right.

VI. CONCLUSION

In sum, Chinese policy on reproduction has evolved since 1949 from encouraging reproduction to limiting reproduction, and ultimately to a strict limitation, which has only recently been relaxed. The different implementation of the one-child system in the provinces was important to understanding the reality of the national one-child policy. After amendment of Article 18 of the Population and Family Planning Law in 2016, China has entered a stage that allows two children for all couples. The implementation of this system will also depend on specific regulation and execution in the provinces.

As a basic system regulated in the Chinese Constitution, the family planning system has now been implemented for more than three decades. Since 2016, the Chinese government has liberalized its former policy at the legislative level, but reproduction in China still has many restrictions. Chinese law is far from guaranteeing a right of reproduction as a basic human right of all Chinese citizens under the Constitution.

Chinese population and reproduction policies undertake to address many considerations about the national economy, society, culture, and politics. Any reform of the current system needs not only to be suitable for social development at the time, but also to address these other concerns as well. Nonetheless, compared with the strict reproductive system of the 1980s, recent changes have made the system looser and freer. There is reason to believe that the transition from an obligation to a right for reproduction may be a long, but expectable, process in China.